

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of Time Warner Cable Inc. for	)	WC Docket No. 13-204
Preemption Pursuant to Section 252(e)(5) of	)	
the Communications Act, as Amended, of the	)	
North Carolina Rural Electrification Authority	)	
for Failure to Arbitrate an Interconnection	)	
Agreement with Star Telephone Membership	)	
Corporation	)	

**REPLY COMMENTS OF STAR TELEPHONE MEMBERSHIP CORPORATION**

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**I. INTRODUCTION AND SUMMARY**

Star Telephone Membership Corporation (“Star”) hereby submits these reply comments in opposition to Time Warner Cable Inc.’s (“Time Warner”) Petition for Preemption. Nothing in the opening round of comments demonstrates that the North Carolina Rural Electrification Authority (“NCREA” or “Authority”) has “failed to act” on Time Warner’s petition to arbitrate an interconnection agreement between Time Warner and Star. The record conclusively shows that the NCREA has been diligently working to resolve all of the issues presented in Time Warner’s petition for arbitration. The NCREA acted well within its discretion when it “set forth a procedural schedule calling for an interconnection agreement to be considered pending resolution of Star’s Petition seeking suspension or modification of its 47 U.S.C. § 251(b) obligations.”<sup>1</sup>

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<sup>1</sup> NCREA Comments to Time Warner Cable Inc.’s Petition for Preemption at i, WC Dkt. No. 13-204 (filed Sept. 6, 2013) (“NCREA Comments”).

## II. ARGUMENT

### A. The NCREA Has Not Failed to Act.

As shown by Star in its initial comments, Time Warner has not carried its burden of demonstrating that the NCREA has failed to act within the meaning of Section 252 and Commission Rule 51.803(b).<sup>2</sup> The NCREA has been diligently working to resolve all of the issues presented in Time Warner's petition for arbitration. Contrary to Time Warner's assertion, the NCREA has neither refused to initiate an arbitration nor refused to resolve a particular issue in the arbitration. The NCREA has issued 25 orders relating to various aspects of the proceedings and consolidated Time Warner's petition with Star's Section 251(f)(2) petition pursuant to Section 252(g). The Commission cannot overlook that much of the delay is attributable to Time Warner's gamesmanship and forum shopping.

The NCREA's comments establish that the Authority has been working diligently toward a resolution of Time Warner's arbitration petition. The Authority has confirmed that it "will move forward with arbitration, but only after it determines whether any of Star's Section 251(b) obligations should be modified or suspended."<sup>3</sup> "While years have passed since [Time Warner's] initial request, those years have been spent deciding relevant issues and have led to lengthy litigation before the NCREA and up to the federal court. The NCREA has not been dormant, but has actively moved the proceedings between Star and [Time Warner] forward as suitable pursuant to the Telecommunications Act."<sup>4</sup> If not for Time Warner's delaying tactics, the NCREA would have ruled "on the Section 251(f)(2) petition within 180 days,"<sup>5</sup> leaving

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<sup>2</sup> "The party seeking preemption *must prove* that the state has failed to act to carry out its responsibilities under section 252 of the Act." 47 C.F.R. §52.805(b) (emphasis added).

<sup>3</sup> *Id.* at 6.

<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Id.* at 6.

plenty of time to complete the arbitration. The Commission has excused statutory deadlines where, as here, the state commission has been diligent.<sup>6</sup>

COMPTTEL is mistaken in asserting that “the NCREA has yet to agree to schedule the arbitration” and that it has “failed to commence” a proceeding on Time Warner’s petition for arbitration.<sup>7</sup> To the contrary, the NCREA has consolidated Star’s Section 251(f)(2) petition with Time Warner’s petition for arbitration and scheduled the arbitration for the second phase of its two-phased approach.<sup>8</sup> “Should the Authority determine that Star’s 47 U.S.C. § 251(b) obligations should not be suspended or modified, the parties shall proceed to Phase II.”<sup>9</sup> During Phase II, the NCREA “will conduct an arbitration regarding an interconnection agreement between [Time Warner] and Star” and “make a final determination regarding the interconnection agreement.”<sup>10</sup> COMPTTEL may not agree with the NCREA’s choice of procedures, but it cannot credibly assert that the NCREA has not scheduled or commenced a proceeding to resolve the arbitration.

**B. The NCREA Has Ample Discretion to Adjudicate the Threshold Issues Presented in Star’s Suspension Petition Before Conducting the Arbitration.**

Star also explained why the NCREA made a reasonable decision to proceed with Star’s Section 251(f)(2) petition before conducting the arbitration. The NCREA’s two-phased approach is the most efficient way to resolve the parties’ underlying dispute because Star’s

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<sup>6</sup> See, e.g., *Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T of Texas*, Memorandum Opinion and Order, WC Dkt. No. 09-134, 24 FCC Rcd. 12573, 12577 (Rel. Oct. 9, 2009) (“*UTEX I*”); *UTEX Communications Corporation Petition for Preemption*, Memorandum Opinion and Order, WC Dkt. No. 09-134, 25 FCC Rcd. 14168, 14169-70 (Rel. Oct. 6, 2010) (“*UTEX II*”).

<sup>7</sup> COMPTTEL Comments in Support of Time Warner Cable Inc.’s Petition for Preemption at 1-2, WC Dkt. No. 13-204 (filed Sept. 6, 2013) (“COMPTTEL Comments”).

<sup>8</sup> Preemption Petition, Ex. 14, NCREA Order at 4 (Apr. 2, 2013).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*; see also NCREA Comments at 1.

suspension petition presents predicate issues that must be resolved before the NCREA can arbitrate an interconnection agreement. If the NCREA grants Star's suspension petition, it could moot—or at least materially affect—Time Warner's petition for arbitration.<sup>11</sup> The NCREA's choice of procedures fits comfortably within its discretion under Section 252.

COMPTEL argues that the *CRC Declaratory Ruling* supports preemption,<sup>12</sup> but that decision demonstrates the reasonableness of the NCREA's procedural approach. Put simply, the NCREA will have no duty to arbitrate an interconnection agreement between Time Warner and Star if it relieves Star of its duties under Section 251(b) because Section 251(a)(1) will impose Star's only obligation to interconnect with Time Warner. The Commission confirmed in its *CRC Declaratory Ruling* that state commissions have no duty to arbitrate an interconnection agreement under Section 251(a)(1) because "the procedures of Section 252 are not applicable in matters involving Section 251(a) alone."<sup>13</sup> As the Commission explained, "the general interconnection obligation of section 251(a) . . . is [not] implemented through the negotiation and arbitration scheme of section 252."<sup>14</sup> This is because "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed" with the state commission pursuant to section 252(a)(1).<sup>15</sup> Thus, the NCREA made a reasonable decision that it should

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<sup>11</sup> *Petition of CRC Communications of Maine Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended*, Declaratory Ruling, WC Dkt. No. 10-143, GN Dkt. No. 09-51, CC Dkt. No. 01-92, Rel. No. FCC 11-83, 26 FCC Rcd. 8259, ¶ 21 (Rel. May 26, 2011) ("*CRC Declaratory Ruling*").

<sup>12</sup> COMPTEL Comments at 4.

<sup>13</sup> *CRC Declaratory Ruling*, ¶ 21.

<sup>14</sup> *Id.* ¶ 21 n.76 (quoting *CoreComm Communications, Inc., & Z-Tel Communications, Inc., v. SBC Communications, Inc.*, et al., File No. EB-01-MD-017, Order on Reconsideration, 19 FCC Rcd. 8447, 8454-55, ¶ 18 (Rel. May 4, 2004)).

<sup>15</sup> *Id.* (quoting *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File & Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, WC Dkt. No. 02-89, 17 FCC Rcd. 19337, 19341, n.26 (Rel. Oct. 4, 2002)).

proceed first with Star’s Section 251(f)(2) petition because that proceeding could moot all or part of Time Warner’s arbitration petition.

At a minimum, the NCREA reasonably believed that its two-phased approach would be the most efficient course because the outcome of the suspension proceeding has the potential to greatly affect the terms of any subsequent interconnection agreement between Star and Time Warner. “It is clear that the substance of what [Time Warner] seeks through an interconnection agreement will be the subject of what is considered in the 251(f)(2) proceeding.”<sup>16</sup> Indeed, Time Warner is “seeking to simultaneously litigate the question of whether Star is exempt from [Section 251(b)] duties while negotiating an agreement that provides for those arrangements. This approach is inappropriate and inefficient.”<sup>17</sup> As the NCREA explained, “[i]t is procedurally appropriate to first determine what Section 251(b) requirements may be modified or suspended before having the parties enter into an interconnection agreement” involving these same requirements.<sup>18</sup> “By taking the approach ordered by the NCREA, determining whether to suspend or modify Star’s obligation to provide any of the interconnection arrangements sought by [Time Warner] will provide clarity in the proceeding to determine what interconnection arrangements are to be provided by Star.”<sup>19</sup>

COMPTEL claims that “it would be impossible for the NCREA” to grant Star’s suspension petition in “the absence of an interconnection agreement.”<sup>20</sup> That is wrong. Nothing in Section 251(f)(2) requires the adoption of an interconnection agreement *before* a state commission rules on a petition for suspension or modification. Nor is there any impediment to

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<sup>16</sup> NCREA Comments at 11.

<sup>17</sup> *Id.* at 11-12.

<sup>18</sup> *Id.* at 8.

<sup>19</sup> *Id.* at 11.

<sup>20</sup> COMPTEL Comments at 3.

the NCREA making all of the findings required by Section 251(f)(2) before arbitrating an interconnection agreement. Indeed, the NCREA has already found that “Star has sufficiently pled the elements necessary to request suspension or modification pursuant to 47 U.S.C. § 251(f)(2).”<sup>21</sup> COMPTTEL’s challenge to the NCREA’s choice of procedures improperly invites the Commission to “sit as an appellate tribunal to review the correctness of state resolution of such disputes.”<sup>22</sup>

Nothing supports COMPTTEL’s claim that the NCREA has proposed to suspend Star’s “obligation to interconnect with other carriers” such as Time Warner.<sup>23</sup> The NCREA has been clear that it “has not decided to block or prevent [Time Warner] and Star from entering into an interconnection agreement.”<sup>24</sup> Whatever the outcome of the Section 251(f)(2) proceeding, Star will continue to have a duty to interconnect with Time Warner under Section 251(a)(1) because Star’s suspension petition only seeks relief from its duties under Section 251(b).

Finally, COMPTTEL makes a confusing argument that Section 253 supports preemption in this case.<sup>25</sup> As a threshold matter, the Commission cannot rely on Section 253 as a basis for preemption in this proceeding because Time Warner has not sought preemption under Section 253, and the Commission has not complied with the notice-and-comment requirement in Section 253(d).<sup>26</sup> In addition, the NCREA has not enforced or imposed any “legal requirement” that is preventing Time Warner from providing telecommunications services in North Carolina. Nor

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<sup>21</sup> Preemption Petition, Ex. 14, NCREA Order, at 3 (Apr. 2, 2013).

<sup>22</sup> *Global NAPS, Inc. v. FCC*, 291 F.3d 832, 837 (D.C. Cir. 2002).

<sup>23</sup> COMPTTEL Comments at 4.

<sup>24</sup> NCREA Comments at 10.

<sup>25</sup> COMPTTEL Comments at 5.

<sup>26</sup> 47 U.S.C. § 253(d) (“If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.”).



has Time Warner “provided a sufficient factual basis” to support a claim that the NCREA’s conduct in this matter “materially inhibit[s] or limit[s] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”<sup>27</sup> In fact, Time Warner has been authorized to provide such services within the State,<sup>28</sup> and the NCREA has expressed its willingness to arbitrate an interconnection agreement between Time Warner and Star.<sup>29</sup> The only question in this case is whether, by consolidating the proceedings and adopting a two-phased approach to the arbitration, the NCREA has “failed to act” within the meaning of Section 252. The answer is no.

### III. CONCLUSION

For the foregoing reasons, the Commission should deny Time Warner’s Preemption Petition.

Respectfully submitted,

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<sup>27</sup> *In re Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.’s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission*, 13 F.C.C.R. 1755, 1776 (1997).

<sup>28</sup> Time Warner Preemption Petition at 4; *see also* NCREA Comments at 6.

<sup>29</sup> Preemption Petition, Ex. 14, NCREA Order, at 4 (Apr. 2, 2013).

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